

***United States Court of Appeals  
for the Second Circuit***



**REPLY BRIEF**





# 76-4195

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

76-4195

FRANK L. SILVERMAN,

Appellant,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

FRANK L. SILVERMAN and ANNA SILVERMAN,

Appellants,

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

INTRODUCTORY STATEMENT

This reply brief is addressed to the following  
issues:

1. The Tax Court improperly entered decision on the stipulation of July 7, 1976, knowing that the said taxpayer executed the said stipulation while ill and in a state of shock.
2. The denial of the taxpayer's discovery application by the Tax Court, denied taxpayer an opportunity to properly prepare for trial and meet the issues in these consolidated cases.
3. The failure of the Tax Court to grant an adequate continuance of these cases to afford taxpayer a reasonable opportunity to examine and study these



voluminous records and documents delivered to taxpayer on the eve of trial constituted an abuse of judicial discretion by the Tax Court.

4. The items of the appellee's brief will be serially replied to by the taxpayer.

#### P O I N T   I

THE DECISION BASED ON THE STIPULATION OF JULY 7, 1976, WAS ERRONEOUSLY ENTERED IN THE TAX COURT BECAUSE OF THE INVOLUNTARY ACT OF THE TAXPAYER

The taxpayer did not elect to enter into a stipulation of settlement on the taxpayer's own volition as the record clearly indicates (A-657 continuing) (A-693 continuing).

The record of the trial of June 24, 1976 and June 25, 1976, clearly points out that the taxpayer when he was possessed of his well being refused the Court's constant urging of the agreement to execute a stipulation of settlement.

The case resumed June 25, 1976, and during said session taxpayer requested that the Tax Court declare a mistrial because of what took place in the Court June 24, 1976, but the Court denied said application of the taxpayer and the case was continued to Tuesday, at 12:00 P.M.

The trial of the case resumed July 7, 1976, at 9:45 A.M.

During the early part of the morning of July 7, 1976, the taxpayer became ill (A-726 lines 24-25) and respectfully asked for a continuance, which was denied by the Court. The taxpayer became dizzy and unable to stand and requested water (A-727 lines 3-4).



Subsequent to that event the record is clear that the Tax Court then dictated the stipulation on July 7, 1976, and not the taxpayer, the taxpayer was in no position to make a judgment and to evaluate or comprehend what was going on in the Tax Court (A-735 lines 10-20).

When the taxpayer regained his composure and examined the schedules as prepared by the tax Court, he realized that the payments made to his clients out of the so called unexplained deposits were not accounted for in said schedule and that the taxpayer was not given any credit for such payments and thus the large amount of the unexplained deposits which the Commissioner imposed the tax.

The taxpayer immediately moved before the Tax Court, pursuant to Rule 161 and 162 of the United States Tax Court Rules, to call the Court's attention of the aforesaid facts (A-304-318).

The Tax Court denied the taxpayer's application (A-319).

Spector v Commissioner 42 T.C. 110 (1964)

The Court granted a hearing in the case above, but not in the case at bar.

The appellee cites Kruger v Commissioner, 48 T.C. 824, 832 (1967) and Stanley v Commissioner, 45 T.C. 555, 561-562 (1966), both of these cases are inapplicable to the case at bar.

Rubenstein v Rubenstein, 20 N.J. 359-

"No legal consequences should attach to an involuntary act.."

That consent is the very essence of a contract, if there is no actual consent there is no contract. Duress in its more extended sense means that the degree of constraint or danger actual or threatened and impending such as in fact works to control the will..

Because of the analytical and factual similarity and factual



concept between the concept of duress as used in the law of contracts and rule on nonliability an involuntary act locally in this case, the New York Rule should apply. (5 Williston on Contracts-1605)

The appellee indicates on page 15 of its brief that the taxpayer was given credit for payments made to clients when a case settled out of the unexplained deposits. That on an examination of the Government's exhibit 24 X show otherwise. That said schedule indicates that the taxpayer was charged with the fee of \$1000.00, but the actual fee in that case (Drelinger) was only \$425.00 (See Note 8) on said page.

That case and the many other cases as listed by the Government, was the reason of the so called large sums as the unexplained deposits that the taxpayer was charged with and upon which the Government imposed the tax and the penalty on said tax.

But when the taxpayer realized what the Government had not given the taxpayer the allowable credits and instead charged the taxpayer with unexplained deposits that payments made to clients during the course of the many years, immediately made the motion in these case under Rule 161 and 162 of the United States Tax Court Rules, with respect to the above.

The Tax Court denied the taxpayer's application, without affording the taxpayer an opportunity to submit the above facts, though the appellee raised no objection to said application.

The Court even in the Spector v Commissioner, 42 T.C. 110, 114 (1964,) afforded the taxpayer a hearing and was heard on the stipulation.



The Tax Court did not afford the taxpayer an opportunity to be heard on his application.

The taxpayer was directed to go to trial in these consolidated cases, by the same Judge who made a public pronouncement that he would not sit and preside over these cases because of his impatience with the taxpayer. Yet the the same Judge ordered these cases to trial and same were to be heard before him.

That under such circumstances a taxpayer can hardly expect to receive a fair and impartial trial.

The Tax Court erred in denying the taxpayer an opportunity to be heard on his application regarding the stipulation of July 7, 1976, in the light of all the facts and circumstances in these cases.

The denial of said application to the taxpayer was a denial of due process to the taxpayer in these cases.



P O I N T   I I

THE DENIAL OF THE TAXPAYERS DISCOVERY  
APPLICATION BY TAX COURT WAS PREJUDICIAL  
TO THE TAXPAYERS RIGHTS IN THESE CONSOLIDATED  
CASES.

The Tax Court erred as a matter of law in denying the taxpayers' motion for discovery and inspection under Rule 71 of Tax Court's Rules pertaining to these consolidated cases.

The Commissioner in his notices of deficiencies totalled all sums in the making of the assessments against taxpayers.

The taxpayer to determine a breakdown of these amounts made several motions for bills of particulars. The Court below denied all of the motion. The denial of said motions by the Court below was based on the statements submitted by the Commissioner that all of the information he had was given to the taxpayer, a fact that was later found to be not so.

The taxpayers moved before the Tax Court for an order pursuant to Rule 71 of the Tax Court Rule, and said motion came before the Tax Court. That application was denied too(A-348-352)

But when the cases came on for trial February 23, 1976, the Commissioner delivered to the taxpayers in excess of 1000 exhibits and documents.

The taxpayers claim that had the bills of particulars been furnished when duly demanded and/or discovery granted taxpayer the said taxpayers would have had an opportunity to properly prepare for trial and be in aposition to meet the issues in these consolidated cases.

The taxpayers because of such action on the part of the Commissioner was greatly prejudiced in these cases, by not having an adequate opportunity to properly prepare for trial.



### P O I N T   I I I

THE FAILURE ON THE PART OF THE TAX COURT TO GRANT TAXPAYERS AN ADEQUATE CONTINUANCE OF THESE CASES TO AFFORD TAXPAYERS A REASONABLE OPPORTUNITY TO EXAMINE AND STUDY THESE VOLUMINOUS RECORDS AND DOCUMENTS ON THE EVE OF TRIAL CONSTITUTED AN ABUSE OF DISCRETION

A reading of Rule 134 does not indicate that the Tax Court may not grant a continuance of a case for good cause shown.

The Tax Court was fully aware of the fact that the Commissioner delivered to the taxpayer on the eve of the trial of these consolidated cases in excess of 1000 exhibits and documents on February 23, 1976. The Tax Court knew of the difficulty that the taxpayers had encountered, the Tax Court knew that the Commissioner refused to grant taxpayers bills of particulars, the Tax Court knew that the delivery of such large amount of material would consume a great many hours of preparation to be in a position to meet the issues, yet the said Court refused to grant an adequate period of time to the taxpayers. That under such circumstances the Tax Court as a matter of law abused its discretion.

The taxpayer became ill July 7, 1976, and respectfully asked the Court for a continuance, the Court refused to grant same to the taxpayer, though taxpayer was unable to stand on his feet in the Court room.

That under such circumstances the Tax Court denying a sick person a continuance constituted an abuse of discretion as a matter of law. Katz v Commissioner, 188 F.2d 957, 959 (C.A.2, 1951) is inapplicable to the case at bar. Further Rule 149(b) cited by appellee is inapplicable.

That Rule deals with the failure to produce evidence in support of an issue of fact as to which a party has the burden.

The fact in this case was that the taxpayer became ill and unable to continue with the trial of these cases.



P O I N T   I V

THE NOTICE OF DEFICIENCY DATED JUNE 6, 1968, SEPTEMBER 15, 1972 and SEPTEMBER 15, 1972, WERE AT VARIANCE WITH THE SCHEDULES SUBMITTED BY COMMISSIONER ON THE TRIAL OF THESE CASES IN THE TAX COURT.

The Commissioner served the 90 days notice of taxpayer June 6, 1968, for the tax year 1960, pursuant to Rule 7463. In said notice the Commissioner assessed the taxpayer \$36,843.21 and the fraud penalty of \$18,421.61.

The Commissioner also served taxpayers a 90 day notice of deficiency for years 1961 and 1962 and for years 1963, 1964 and 1965.

For year 1961-	\$27,263.68	fraud penalty \$13,631.84
For year 1962-	22,107.44	fraud penalty 11,053.72
For the year 1963-	9,621.42	fraud penalty 4,810.71
For the year 1964-	12,437.66	fraud penalty 6,218.83
For the year 1965-	23,678.20	fraud penalty 11,839.10

The Commissioner when he filed his answer to the taxpayer's petition in the tax Court, he claimed the fraud penalty on the tax of \$7,771.37, for the year 1961(A-82) paragraph 7 of his answer.

For the year 1962, he claimed the fraud penalty on the tax of \$4,506.93(A-83) paragraph 7 of his answer.

For the year 1963, he claimed the fraud penalty on the tax of \$4,732.61(A-155) paragraph 7 of his answer.

For the year 1964, he claimed the fraud penalty on the tax of \$3,736.48(A-156) paragraph 7 of his answer.

For the year 1965, he claimed the fraud penalty on the tax of \$8,606.43(A-157) paragraph 7 of his answer.



The Commissioner used a third set of schedules in the Tax Court(A-410)

The Court stated on page A-418 line 3-"That's right"

The Court- "I-- I say this, if these schedules weren't revised schedules, Mr. Silverman, I'd jump all over the respondent because I don't want to go back and --, to a point where we don't reflect any education that we have achieved during the last four years...."

The taxpayer contend that the Tax Court erred by not limiting the Commissioner to his pleadings in these cases.

It is further claimed by the taxpayer that since the deficiency notices were at variance with the new schedules as submitted by the Commissioner in the Tax Court, the motion to dismiss the notices of deficiencies mailed to taxpayer September 15,1972, should have been dismissed by the Tax Court.

The cases cited by the appellee -Papa v Commissioner, 464 F.2d.150(C.A.2,1972) and O'Connor v Commissioner,412 F.2d.304(C.A.2 1969) are inapplicable to the case at bar.

Therefore the appellee's argument on pages 21 and 22 of his brief must fall, because the fraud penalty as set forth in the schedule of July,1976, is also at variance with the claimed amounts set forth in the answer of the Commissioner.(A-82)

Limitation of assessments and collection may be begun by the Commissioner at any time upon the discovery of the fraud, but once discovered the Commissioner must enforce the collection of same within the statutory period(26 U.S.C.A.6501).

In the case at bar the Commissioner in possession of all the facts since August 4,1967(A-327) did nothing until September 15,1972, a period of more than five years when he served the notice



of deficiencies on the taxpayers.

The taxpayers contend that the Commissioner by not serving the said notice of deficiencies within the Statutory period was guilty of laches and the assessments made against the taxpayers are barred by the Statute of Limitations( 26 U.S.C.A.6501'.

Fraud will toll the statute of limitations on any reaudit of any item to date of discovery, once discovered the statute begins to take effect. Lowy v Commissioner,288 F.2d 517

The claim of the appellee that the taxpayer agreed to the entry of the decisionfor all the years is not so. The taxpayer did not consciously agree to the entry of the decision by the tax Court. The said agreement was dictated by the Tax Court that began June 24,1976 and continued to July 7,1976,when the taxpayer became ill and was dizzy and dazzed at the time.

June 25,1976, the taxpayer respectfully asked for a mistrial in the Tax Court, because of the fact the taxpayer was of the firm belief that what had taken place in the Court Room June 24,1976, a fair trial would not be accorded to the taxpayer.

The Tax Court denied the application to the taxpayers, and the Court ordered the trial of these case to continue.

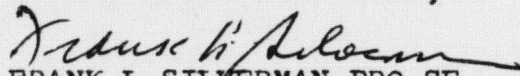
Under all the circumstances and facts in this case and various pronouncements made by the Tax Court prior to and during the trial of these case, taxpayer submits,an inpartial and fair trial could not be had by the taxpayers and the denial by the tax Court a mistrial constituted error.



# CONCLUSION

For all of the foregoing reasons, the denial of the taxpayers motion to vacate the stipulation of July 7, 1976, including the decision thereon dated July 15, 1976, and the decision of the Tax Court dated July 12, 1976, be reversed; the taxpayers respectfully further request that the notice of deficiency dated June 6, 1968, the notices of deficiencies dated September 15, 1972, be vacated and/or in the alternative this case be remanded to the Tax Court and for such other and further and different relief as to this Court may seem just and equitable in the premises.

RESPECTFULLY SUBMITTED,

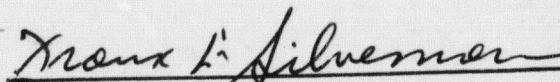
  
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January 14, 1977.

## CERTIFICATE OF SERVICE

It is hereby certified that service of this reply brief has been made on the appellee's attorney, Gilbert E. Andrews, Esq., by mailing a copy thereof on the 14th day of December, 1977, in an envelope, with postage prepaid, properly addressed to him as follows:

Gilbert E. Andrews, Esq.  
Department of Justice  
Tax Division  
Washington, D.C. 20530

  
FRANK L. SILVERMAN



RULE 10:

MOTION FOR RECONSIDERATION OF FINDINGS OR OPINION

"Any motion for reconsideration of an opinion or findings of fact with or without a new trial or further trial shall be filed within 30 days after the opinion has been served, unless the Court shall otherwise permit".

RULE 162:

Motion to vacate or revise decision

" Any motion to vacate or revise a decision with or without a new trial or further trial shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit".